COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	**CASE NO. 2010 CR 00225**
vs.	:	**Judge McBride**
CHRISTOPHER THOMPSON	:	**DECISION/ENTRY**
Defendant	:	

William Ferris, assistant prosecuting attorney, for the state of Ohio, 123 North Third Street, Batavia, Ohio 45103.

W. Stephen Haynes, assistant public defender, for the defendant Christopher Thompson, 10 South Third Street, Batavia, Ohio 45103.

This cause is before the court for consideration of a motion in limine/*Daubert* challenge filed by the defendant Christopher Thompson.

The court scheduled and held a hearing on the motion on January 25, 2010. At the conclusion of that hearing, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE

The defendant Christopher William Thompson is charged in a three-count indictment with (1) two counts of Aggravated Trafficking in Drugs in violation of R.C. 2925.03(A)(2), felonies of the third degree, and (2) one count of Aggravated Possession of Drugs in violation of R.C. 2925.11(A), a felony of the third degree.

The defendant now makes a *Daubert* challenge to the state's intended use of fingerprint evidence in the case at bar. According to the defendant's motion, the defendant's latent fingerprint is alleged to have been lifted from a safe containing suspected narcotics.

At the motion in limine/*Daubert* hearing, testimony from the state's fingerprint witness, Deputy Robert Dicker, was presented. Deputy Dicker has been an evidence technician with the Crime Scene Investigation Unit of the Hamilton County Sheriff's Department for the past four and a half years. Prior to that, starting in 1993, he was responsible for classifying fingerprints for all individuals who were processed at the Hamilton County jail. Deputy Dicker has had training in fingerprint classification and latent fingerprints, including courses given by the Federal Bureau of Investigation and the Miami Valley Regional Lab as well as a course held in South Carolina.

In the case sub judice, Detective Lacey of the Goshen Township Police Department photographed and lifted the fingerprint at issue. Both the photograph and the lift were presented to Deputy Dicker, who was then asked to compare that latent fingerprint to the fingerprints of a known suspect, the defendant Christopher Thompson.

Deputy Dicker retrieved Thompson's fingerprints from the State of Ohio's Automated Fingerprint Identification System (AFIS). Deputy Dicker then proceeded to compare the photograph of the latent fingerprint to the defendant's fingerprints. Deputy Dicker used the photograph of the fingerprint, as opposed to the actual lifted print, because it was of better quality for comparison.

When making his comparison in this case or in any case, Deputy Dicker first looks to see what type of pattern the fingerprint contains – i.e., whirls, loops, or arches. Once he matches that characteristic, he then looks at the print further to see if there are other similarities such as ending ridges and/or bifurcations. All of these different characteristics are known as "minutiae" or "points of comparison."

In the case at bar, Deputy Dicker opined that the ridge characteristics in the latent print and the defendant's print were the same and that they were a match. The Hamilton County Sheriff's Office generally requires at least seven points to opine that two prints are a match. However, Deputy Dicker found twelve or thirteen points of comparison that matched between the two prints. Deputy Dicker further opined that there is not a possibility that another person could also be a match to the latent print because, in his training, he has been taught that fingerprints are both individually unique and they do not change over the course of time. Deputy Dicker admitted that this theory would be impossible to scientifically test and that, instead, this is more of a commonly-held assumption that has yet to be disproven.

It is Deputy Dicker's policy that his partner cross-checks each fingerprint identification he makes. In the case at bar, Deputy Dicker indicated that both he and his partner agree that the latent print and the defendant's print are a match. Deputy Dicker

also stated that he is "one-hundred percent sure" that the prints are a match and that he would not testify that two prints are a match without that absolute certainty.

LEGAL ANALYSIS

"In addition to the requirement of relevancy, expert testimony must meet the criteria of Evid.R. 702, which provides that a witness may testify as an expert if:

> "(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons * * * ;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
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> (C) The witness' testimony is based on reliable scientific, technical, or other specialized information."[1]

Pursuant to the United State Supreme Court's holding in the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 429, as adopted by the Ohio Supreme Court in *Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607, 687 N.E.2d 735, several factors may be relevant in evaluating the reliability of an expert's method for developing a relevant professional opinion, including the following:

> "[W]hether the theory or technique can be and has been tested; whether it has been subjected to peer review and publication; whether there is a high known or potential rate of error; whether there are standards controlling the technique's operations; and whether the theory or technique enjoys

[1] *State v. Davis* (2008), 116 Ohio St.3d 404, 880 N.E.2d 31, ¶¶ 135-138, quoting Evid.R. 702.

> general acceptance within a relevant scientific or expert community."[2]

In *State v. Belville* (June 24, 2010), 4th Dist. No. 09CA10, 2010-Ohio-2971, the defendant challenged the trial court's decision allowing the State's expert witness to testify regarding latent-fingerprint evidence, arguing that such evidence is unreliable.[3] The court held as follows:

> "Belville contends that after examining the methodology and principles of latent-fingerprint identification during the Rule 702 hearing, the trial court should have excluded the fingerprint evidence. But had the court so ruled, that ruling would have flown in the face of uncounted criminal prosecutions that have, for decades, relied on such evidence.
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> Though Belville cites law review and newspaper articles which call into question various aspects of the use of fingerprint identification evidence, she cites not a single case supporting her position that such evidence is unreliable. In contrast, Ohio courts, including the Supreme Court, have clearly determined that such evidence is reliable and admissible under Evid.R. 702. 'The reliability of fingerprint evidence is well established.' *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, at ¶ 140, quoting *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, at ¶ 93. '[I]t is well known and accepted that latent-fingerprint identification satisfies the standard of reliability.' *State v. Nunley*, 6th Dist. No. H-08-018, 2009-Ohio-4597, at ¶ 21. "[T]he Ohio Supreme Court in *State v. Miller*, has recognized the use of fingerprints for identification purposes in criminal cases, stating 'fingerprints corresponding to those of the accused are sufficient proof of his identity to sustain his conviction, where the circumstances show that such prints, found at the scene of the crime, could only have been impressed at the time of the commission of the crime.' * * * This court and other appellate courts have similarly ruled on

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[2] *State v. Payne* (Sept. 16, 2003), 10th Dist. Nos. 02AP-723 and 02AP-725, 2003-Ohio-4891, ¶ 52, quoting U.S. *v. Havvard*, 260 F.3d 591 (7th Cir., 2001), quoting *Kumho Tire Co. v. Charmichael* (1999), 5206 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238; and *Daubert*, supra, 509 U.S. at 589.

[3] *State v. Belville* (June 24, 2010), 4th Dist. No. 09CA10, 2010-Ohio-2971, at ¶ 8.

> the sufficiency of fingerprint evidence.' *State v. Boone*, 6th Dist. No. L-08-1409, 2010-Ohio-1481, at ¶ 16, quoting, *State v. Miller* (1977), 49 Ohio St.2d 198, 361 N.E.2d 419, at syllabus.
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> We agree with, and to the extent that the Supreme Court of Ohio has ruled on the issue, are bound by the cases cited above. Accordingly, we reject Belville's argument that the trial court should have excluded the fingerprint evidence on the basis that such evidence is unreliable. The trial court's decision to allow the latent-fingerprint evidence was clearly not an abuse of discretion.* * * "[4]

In *State v. Boone*, 6th Dist. No. L-08-1409, 2010-Ohio-1481, cited by the court in the *Belville* decision, the defendant challenged the state's fingerprint expert, arguing that his testimony failed to conform to the *Daubert* factors. While that court's decision did not contain an explicit examination of the expert's testimony under the *Daubert* standard, the court concluded that the expert was qualified to testify and that the latent-fingerprint evidence was admissible.[5] Similarly, while also not addressing each *Daubert* factor in its decision, the court in *State v. Johnson* (June 19, 2003), 8th Dist. Nos. 81692 and 81693, 2003-Ohio-3241, overruled a *Daubert* challenge to expert testimony regarding fingerprint identification.[6]

In U.S. *v. Havvard*, 260 F.3d 591 (7th Cir., 2001), the defendant argued that fingerprint evidence is inadmissible under Evid.R. 702 and *Daubert* because "it is not 'scientifically based.' "[7] The defendant further argued that "* * * fingerprint comparisons are not reliable because the government admits that the basic premise that all fingerprints are unique remains unproven, and because there are no objective

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[4] Id. at ¶¶ 8-10.
[5] *State v. Boone*, 6th Dist. No. L-08-1409, 2010-Ohio-1481, at ¶¶ 9 and 16.
[6] *State v. Johnson* (June 19, 2003), 8th Dist. Nos. 81692 and 81693, 2003-Ohio-3241, at ¶¶ 38-39.
[7] *Havvard*, supra, 260 F.3d at 600.

standards for defining how much of a latent fingerprint is necessary to conduct a comparison or for evaluating an individual examiner's comparison."[8] The circuit court concluded that " * * * it is clear from the district court's thorough order that it properly considered the *Daubert* factors in analyzing [the defendant's] motion and concluded that fingerprinting techniques have been tested in the adversarial system, that individual results are routinely subjected to peer review for verification, and that the probability for error is exceptionally low."[9]

Ohio's Tenth District Court of Appeals has adopted the reasoning set forth in the *Havvard* case, namely that " * * * despite the absence of a single qualifiable standard for measuring the sufficiency of any latent fingerprint for purposes of identification, the court was satisfied that the latent fingerprint identification easily satisfied the standard of reliability in *Daubert* and *Kumho Tire*."[10]

In *State v. Drafton* (Sept. 11, 2003), 10th Dist No. 02AP-1405, 2003-Ohio-4821, the defendant on appeal argued that he received ineffective assistance of counsel because his attorney failed to challenge the fingerprint evidence offered against him.[11] The defendant offered a law review article in support of his general claim that " * * * fingerprint analysis has been subjected to increased scrutiny by scholarly publications and federal appellate courts."[12] However, the appellate court noted that "* * * the author of that article acknowledges that, although a number of defense attorneys have filed

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[8] Id.
[9] Id. at 601, citing *Kumho*, supra, 526 U.S. at 150.
[10] *State v. Payne*, supra, 2003-Ohio-4891, at ¶¶ 54-55.
[11] *Drafton*, supra, at ¶ 17.
[12] Id., citing Epstein, *Fingerprints: Meet Daubert: The Myth of Fingerprint 'Science' is Revealed* (2002), 75 So.Cal.L.Rev. 605.

motions contesting the admissibility of latent fingerprints identification under *Daubert*, '[t]hus far there is no reported decision granting such a motion.' "[13]

The *Drafton* court went on to cite and discuss the majority holding in *United States v. Crisp*, 324 F.3d 261 (4th Cir.,2003), wherein the court stated in relevant part:

> " 'Fingerprint identification has been admissible as reliable evidence in criminal trials in this country since at least 1911. *See People v. Jennings,* 252 Ill. 534, 96 N.E. 1077 (1911); *see also* Jennifer L. Mnookin, *Finger-print Evidence in an Age of DNA Profiling,* 67 Brooklyn L.Rev. 13 (2001) (discussing history of fingerprint identification evidence). While we have not definitively assessed the admissibility of expert fingerprint identifications in the post- *Daubert* era, every Circuit that has done so has found such evidence admissible. *See United States v. Hernandez,* 299 F.3d 984 (8th Cir.2002) (concluding that fingerprint identification satisfies *Daubert*); *United States v. Havvard,* 260 F.3d 597, 601 (7th Cir.2001) (same); *United States v. Sherwood,* 98 F.3d 402, 408 (9th Cir.1996) (noting defendant's acknowledgment that 'fingerprint comparison has been subjected to peer review and publication,' and holding that trial court did not commit clear error where it admitted fingerprint evidence without performing *Daubert* analysis); *see also United States v. Llera Plaza,* 188 F.Supp.2d 549, 572-73 (E.D.Pa.2002) (discussing long history of latent fingerprint evidence in criminal proceedings, and citing lack of proof of its unreliability, to hold such evidence admissible); *United States v. Joseph,* 2001 WL 515213, *1 (E.D.La. May 14, 2001) (observing that 'fingerprint analysis has been tested and proven to be a reliable science over decades of use for judicial purposes'); *United States v. Martinez-Cintron,* 136 F.Supp.2d 17, 20 (D.P.R.2001) (noting that questions of reliability of fingerprint identifications can be addressed through vigorous cross-examination of expert witness).' "[14]

The *Crisp* court went on to hold that the defendant "has provided us no reason today to believe that this general acceptance of the principles underlying fingerprint

[13] Id.
[14] Id. at ¶ 18, quoting, *Crisp*, supra, 324 F.3d at 266.

identification has, for decades, been misplaced."[15] That court also noted that "[w]hile the principles underlying fingerprint identification have not attained the status of scientific law, they nonetheless bear the imprimatur of a strong general acceptance, not only in the expert community, but in the courts as well."[16]

Furthermore, the Ohio Supreme Court has continued to implicitly sanction the use and reliability of fingerprint identification evidence by, for example, finding that the use of digitally enhanced fingerprint imaging meets the reliability standard of Evid.R. 702 and *Daubert*.[17]

This court shall follow and adopt the well-reasoned opinions noted above which emphasize the long-standing acceptance of the use and reliability of fingerprint identification and which find that fingerprint identification passes the reliability test of Evid.R. 702 and *Daubert*.

In the case at bar, Deputy Dicker has been classifying fingerprints for over fifteen years and has been a Crime Scene Investigation Unit evidence technician for the past four and a half years. He estimated that he has examined over one million fingerprints during his tenure with the Hamilton County Sheriff's Office. He has received training in latent fingerprints and fingerprint classification at various places, including the Federal Bureau of Investigation. The court finds that the requirements of Evid.R. 702(B) have been met and that Deputy Dicker has specialized knowledge, skill, experience, training, and education regarding latent fingerprints and fingerprint identification and qualifies as

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[15] Id. at ¶ 19, quoting *Crisp* at 269.
[16] *Crisp* at 268, citing *Havvard* at 601; *United States v. Llera Plaza*, 188 F.Supp.2d 549, 563 and 572-576 (E.D.Pa.,2002); *U.S. v. Hernandez*, 299 F.3d 984, 991 (8th Cir.,2002); and *People v. Jennings*, 252 Ill. 534, 96 N.E. 1077, 1083 (Ill.,1911).
[17] *State v. Hartman* (2001), 93 Ohio St.3d 274, 283- 285, 4 N.E.2d 1150.

an expert on those topics. Additionally, fingerprint analysis relates to matters beyond the knowledge or experience possessed by lay persons and, as a result, Evid.R. 702(A) has been satisfied.

As noted above, this court has concluded that fingerprint identification and comparison is sufficiently reliable to pass muster under *Daubert* and Evid.R. 702(C) based on prior long-standing case law and acceptance. The court also notes that Deputy Dicker's explanation of the process he underwent to compare and identify the latent fingerprint at issue, including an independent review by a colleague, supports a finding of the reliability of the testimony and the methodology on which his conclusions are based.

The court will note, however, that Deputy Dicker cannot state as an expert that it is "a fact" that he is "one hundred percent correct" in his finding that the fingerprints at issue are a match. He can state that is it is his opinion to a reasonable degree of scientific and/or technical certainty that the prints are a match and he may even state that it is his opinion to a reasonable degree of scientific and/or technical certainty that this finding is one-hundred percent correct and any such opinion can be challenged on cross-examination, but he cannot couch his testimony as if it is an absolute fact. Indeed, the testimony offered by any expert, including Deputy Dicker, is an expert *opinion*, not expert "facts."

CONCLUSION

Based on the above analysis, the defendant's motion in limine/*Daubert* challenge is not well-taken and is hereby denied. However, as noted above, the State's witness is cautioned that he is permitted to testify regarding his expert opinion, and that his testimony should be expressed in those terms.

IT IS SO ORDERED.

DATED:______________________ ______________________________
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile this 31st day of January 2011 to all counsel of record and unrepresented parties.

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